

The claimant appeared by and through his attorney, David M. Bryan, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, William L. Townsley, of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that listed in the Award of the Administrative Law Judge dated December 8, 1993.

STIPULATIONS

The Appeals Board adopts those stipulations listed in the Award of the Administrative Law Judge dated December 8, 1993.

ISSUES

The sole issue presented by oral argument for decision by the Appeals Board was the nature and extent of claimant's disability. The Administrative Law Judge also made findings regarding overpayment of temporary total disability. The Appeals Board hereby adopts those findings relating to the amount of overpayment of temporary total disability and specifically finds that claimant was overpaid eight weeks of temporary total disability. These were eight weeks which claimant was working as a roofer and at the same time, receiving temporary total disability benefits. The Appeals Board does not, however, agree with and modifies as explained below, that portion of the Administrative Law Judge's Order requiring claimant to reimburse respondent amount of the overpayment of temporary total benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board finds that claimant has established that he suffered an accidental injury on September 3, 1991 which resulted in a temporary aggravation of a preexisting condition but that claimant has failed to meet his burden of proving that he suffered any additional permanent disability as a result of the September 3, 1991 accident.

Claimant alleges that he injured his low back on September 3, 1991 when he bent over to pick up clean linen and rugs. He testified that he was transported on a back board to St. Joseph Hospital emergency room following the accident. The record also reflects, however, that claimant concealed from his medical providers a history of low back pain and treatment which is documented to have occurred over a period of time up to shortly before this alleged accident. He also concealed this history at the time of his testimony at the hearing on this claim. When Dr. Abay was given this additional history at the time of his deposition, he concluded that he could not testify that the claimant's alleged injury caused any permanent disability. He gave an opinion that it may have caused an aggravation and that the aggravation may have been temporary only. Dr. Abay was the only expert to testify as to causation after having been given an accurate history.

Claimant's documented history of low back problems begins on December 15, 1987 when he was seen by the Minor Emergency Center with complaints of back pain which he attributed to heavy lifting. Although there were additional records of complaints and treatment of low back pain, the most significant records, for our purposes, are those of 1991. Beginning in February of 1991, claimant visited the Wilbeck Chiropractic Clinic with complaints of "extremely unbearable" back pain. He saw Dr. Dorsch, at the St. Joseph Family Practice Center on February 25, 1991 and reported numerous episodes of back pain in the past. In August of 1991, shortly before his accident of September 3, 1991, claimant again visited the chiropractic clinic. He made complaint of low back pain which he described as "unbearable" and rated the pain as 10 on a scale of 1 to 10. Claimant saw the chiropractor on August 12, 13, 14, 15, 16 and 21, of 1991. On August 22, 1991,

approximately two weeks before the accident involved in this claim, he saw an orthopedic physician, Dr. Paul Lesko. Dr. Lesko diagnosed a lumbar strain and ordered physical therapy. He also recommended restrictions limiting claimant to lifting 15 pounds and suggested that he avoid bending and twisting. Claimant did not report to the physical therapy clinic but did return to the chiropractic clinic where he was seen again on August 23, 26, and 28, 1991. The records then indicate that on August 30, 1991 he called the physical therapy clinic and canceled the therapy. The therapist's note states:

"Due to financial situation, plaintiff wants to talk to his insurance company and then schedule therapy and follow up with Dr. Lesko."

Claimant did not reveal this history to the physicians who treated him after September 3, 1991 when he was injured at work. At the time of his hearing he was asked very direct questions about prior injuries and reported only that he had had two instances of muscle spasms for which he had gone to emergency rooms at Newton, Kansas, and St. Joseph's Hospital in Wichita, Kansas.

Following the injury which is the subject of this claim, claimant was initially treated at St. Joseph Hospital with two pain shots and muscle relaxers. He was released to go home and then referred to Dr. Murphy who prescribed bed rest for 10 days followed by cortisone shots. Dr. Murphy referred claimant to Dr. Eyster, who, after review of MRI test results, scheduled surgery. Claimant, however, was reluctant to have such surgery and was seen for a second opinion by Dr. Abay. Dr. Abay recommended physical therapy rather than surgery. Dr. Abay's physical therapy was prescribed under the care of Dr. Blaty.

The only two medical experts who testified were Dr. Abay and Dr. Blaty. Although Dr. Blaty's appears to assume that claimant's injury resulted from an accident on September 3, 1991, he is not provided with a full and complete history and is not expressly examined on the question of the cause of claimant's disability. Dr. Abay initially gave an opinion that the disability was caused by the accident of September 3, 1991. However, Dr. Abay also testified that claimant had not told him about any prior back problems. When the records of the prior back complaints and treatment were shown to Dr. Abay he concluded that, based upon additional evidence, he was not able to say that what he saw, diagnosed and treated was caused by something that happened on September 3, 1991 as opposed to other incidents. He concluded it is possible his condition was a continuation of the prior injuries. When examined further he did state that it appeared what happened on September 3, 1991 was an aggravation of a preexisting condition. He also testified that the aggravation may have been a temporary aggravation.

The burden is on the claimant to establish the various conditions on which claimant's rights depend. K.S.A. 44-501. The Appeals Board finds that claimant has not met his burden of establishing permanent disability from the September 3, 1991 accident. Dr. Blaty's opinion does not satisfy that burden because it is only an indirect opinion given without knowledge of the prior history. Claimant's own testimony is not given significant weight on this point because he has obviously concealed prior history. Dr. Abay, who gives the only informed opinion, concludes one cannot give an opinion as to causation.

The Appeals Board does find, however, that the evidence establishes a temporary aggravation. There is a credible history of an accident, some increase in the temporary symptoms after the accident from that shown in the records prior to the accident and Dr. Abay does generally tends to support the conclusion that there has been at least, a temporary aggravation. The Appeals Board, therefore, affirms the award of temporary total

disability benefits. The Appeals Board also awards the medical and vocational rehabilitation benefits previously paid. The Appeals Board finds, however, that claimant is not entitled to an award of permanent disability benefits.

(2) Respondent may seek reimbursement from the Kansas Workers Compensation Fund, for the eight weeks of temporary total disability benefits paid while claimant worked as a roofer, but may not obtain reimbursement from the claimant.

The evidence establishes that claimant worked at his own roofing business earning at least \$200.00 per week while at the same time he received temporary total benefits. The Administrative Law Judge found, and neither party disputes, claimant did so for eight weeks. The Administrative Law Judge ordered that claimant reimburse respondent for the eight weeks of temporary total benefits overpaid. The Appeals Board concludes, however, that K.S.A. 1992 Supp. 44-534a(b) provides the only remedy for overpayment. That statute calls for reimbursement by the Kansas Workers Compensation Fund of amounts paid voluntarily or pursuant an order which are later found not to have been owed. Respondent may, therefore, seek reimbursement from the Fund. There is no provision for and by negative implication reimbursement may not be obtained from claimant.

AWARD

WHEREFORE, an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Dan F. Collier, and against the respondent, Western Uniform and Towel Service, and the insurance carrier, Travelers Insurance Company, for an accidental injury sustained on September 3, 1991.

Claimant is entitled to 60.14 weeks of temporary total disability at the rate of \$289.00 per week or \$15,068.46. Claimant is not entitled to an award of permanent disability.

Claimant is entitled to \$13,608.89 in medical benefits previously paid.

Claimant is entitled to the previously paid vocational rehabilitation expenses in the amount of \$3,051.85.

As of December 7, 1993, there would be due and owing to the claimant 52.14 weeks of temporary total disability at \$289.00 per week in the sum of \$15,068.46.

Claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney's fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

DEPOSITION SERVICES

Transcript of Preliminary Hearing

\$ 145.15

IRELAND COURT REPORTING

DAN COLLIER

5

DOCKET NO. 160,523

Transcript of Regular Hearing

Unknown

DON K. SMITH & ASSOCIATES

Deposition of Jerry D. Hardin

\$ 213.50

Deposition of Edmond D. Shearhart

Unknown

Deposition of Dan Franklin Collier

Unknown

Deposition of Brian E. Romalis, M.D.

Unknown

Deposition of Lawrence R. Blaty, M.D.

Unknown

Deposition of Eustaquio O. Abay, M.D.

Unknown

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: David M. Bryan, 608 North Broadway, Wichita, Kansas 67214
William L. Townsley, P.O. Box 997, Wichita, Kansas 67201-0997
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director